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No. 02-1409

In the Supreme Court of the United States

CABLE CAR ADVERTISERS, INC., D/B/A
CABLE CAR CHARTERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the National Labor Relations Board's determination that the back pay period for reduced-hour claimants closed on May 29, 1999.

2. Whether substantial evidence supported the Board's back pay awards for Jonathan Palewicz and John Mozol.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the *Federal Reporter* but is reprinted in 53 Fed. Appx. 467. The supplemental decision and order of the National Labor Relations Board (Pet. App. A5-A7) and the supplemental decision of the administrative law judge in the compliance proceeding (Pet. App. A7-A38) are reported at 336 N.L.R.B. No. 85. The Board's decision and order in the underlying unfair labor practice case are reported at 322 N.L.R.B. 554.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2002. A petition for rehearing was denied on February 21, 2003. Pet. App. A3-A4. The petition for a writ of certiorari was filed on March 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates sightseeing tours and similar transportation services in San Francisco, California. Pet. App. A8. Petitioner employs drivers, dispatchers, ticket sellers, maintenance workers, and mechanics. *Id.* at A9. In the spring of 1993, petitioner's employees began to organize with the Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO (Union). *Id.* at A1, A9. In June 1993, after conducting an election among petitioner's employees, the National Labor Relations Board certified the Union as the employees' exclusive bargaining representative. *Id.* at A9.

In November 1996, the Board issued a decision finding, in agreement with an administrative law judge (ALJ), that, on June 15, 1993, petitioner began a practice of reducing the work hours of a group of employees who supported the Union, contrary to Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3).[1] Pet. App. A9. The Board ordered petitioner to make those employees economically whole for the

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[1] Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to "by discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

unlawful reduction in their work hours and to cease and desist from unlawfully reducing employee work hours. *Id.* at A9-A10. See *In re Cable Car Advertisers, Inc.*, 322 N.L.R.B. 554 (1996), decision supplemented, 324 N.L.R.B. 732 (1997).

The Board further found that, in June and July 1993, petitioner also violated Section 8(a)(3) by laying off or discharging a group of employees who supported the Union, including Jonathan Palewicz (a driver) and John Mozol (a dispatcher). Pet. App. A7, A9. The Board ordered petitioner to reinstate and make whole Palewicz and Mozol (and other employees). *Id.* at A9. In February 1998, the court of appeals enforced the Board's order. *Id.* at A7-A8. See *Cable Car Advertisers* v. *NLRB*, 139 F.3d 903 (9th Cir. 1998) (Table).

2. Subsequently, petitioner and the Board were unable to agree on the amount of back pay due employees under the Board's order. Pet. App. A8. The Board's General Counsel therefore issued a compliance specification against petitioner. *Ibid.*

a. One of the issues in the compliance proceeding was the determination of an appropriate closing date of the back pay period for the employees whose work hours had been unlawfully reduced. See Pet. App. A10, A21-A23. On December 9, 1993, petitioner and the Union had entered into a labor contract that contained seniority provisions and job bidding procedures. *Id.* at A10, A14, A22, A40, A42-A45. Petitioner contended that December 9, 1993, was the appropriate closing date for the back pay period. Petitioner claimed that it did not unlawfully discriminate against employees in the assignment of work after signing the labor contract but instead assigned work in accordance with the contract's terms. *Id.* at A22.

The General Counsel, however, contended that the execution of the labor contract did not terminate the back pay period because petitioner discriminated against employees in the assignment of work even after petitioner signed the contract. Pet. App. A22. The General Counsel contended that the back pay period did not close until May 29, 1999, the date on which petitioner gave employees formal assurances that it would schedule their work in accordance with the labor contract. *Id.* at A10, A22.

After a hearing, an ALJ sustained the General Counsel's position and concluded that "the backpay period for the unlawful reduction in hours continued until May 1999." Pet. App. A23. "[V]iew[ing] this as a burden of proof issue," the ALJ placed upon petitioner "the burden of establishing that the discrimination ceased" as of the December 1993 date. The ALJ concluded that petitioner had failed to carry that burden. *Id.* at A22-A23.

The ALJ credited the testimony of the General Counsel's witnesses that Hoa Van, petitioner's supervisor, "continued to discriminate against them in the assignment of hours" after December 1993. Pet. App. A23. In particular, the ALJ credited discriminatee Palewicz's testimony that Van refused to answer Palewicz's telephone calls when he attempted to bid for work and closed her office door when he appeared in person to bid for work. *Ibid.* The ALJ also credited discriminatee Michael Buckey's testimony that, rather than permit Buckey to bid on available assignments, Van offered work to less senior employees and continually bypassed Buckey for assignments in 1994 and 1995. *Ibid.* The ALJ also relied on petitioner's business records, which demonstrated that "employees junior to the discriminatees continued to work more hours

than the discriminatees" after petitioner signed the labor contract. *Ibid.*; see *id.* at A14-A17. In contrast, the ALJ found that "[a]ll [petitioner] offered" in support of its proposed December 9, 1993, closing date for the back pay period were "general denials that [it] never discriminated in its assignment of work to any of its employees." *Id.* at A23. Based on the persuasive evidence to the contrary in the record, the ALJ found those general denials to be "unpersuasive." *Ibid.*

b. Also at issue in the compliance proceeding was the amount of back pay that petitioner owed Palewicz and Mozol. Pet. App. A32-A33, A35-A37. The ALJ rejected, as contrary to the evidence, petitioner's contention that Palewicz's award should be calculated based on the assumption that he would have worked for petitioner only two days per week (Wednesdays and Thursdays) if he had not been unlawfully discharged. See *id.* at A32-A33. The ALJ also rejected petitioner's contention that, if Mozol had not been unlawfully discharged, his employment would have ended on July 23, 1993, for legitimate reasons. Rather, the ALJ found that Mozol "would have continued in [petitioner's] employ until January 1998." *Id.* at A36-A37.

3. The Board adopted the ALJ's findings and conclusions. Pet. App. A5. It ordered petitioner to pay specified amounts of back pay to the reduced-hour claimants, as well as to Palewicz and Mozol. *Id.* at A6-A7.

4. The court of appeals enforced the Board's order in an unpublished memorandum opinion. Pet. App. A1-A2. The court concluded that "[s]ubstantial evidence supports the National Labor Relations Board's determination of the end dates of the backpay periods." *Id.* at A2. The court further concluded that petitioner "did

not carry its burden of proving that the award to any of the plaintiffs should have been reduced." *Ibid.*

ARGUMENT

The court of appeals correctly enforced the Board's back pay order in this case. The court's unpublished decision does not conflict with any decision of this Court or any other court of appeals. Thus, this Court's review is not warranted.

1. a. In a Board compliance proceeding, "[t]he General Counsel bears the burden of proof in establishing the backpay period." *Nordstrom* v. *NLRB*, 984 F.2d 479, 481 (D.C. Cir. 1993). If the General Counsel carries that burden, then the employer bears the burden of proving, as an affirmative defense, a claim that the back pay award should be reduced because the back pay period closed on an earlier date. See, *e.g.*, *Mastell Trailer Corp.*, 273 N.L.R.B. 1190, 1190-1191 (1984), enforced, 782 F.2d 1047 (8th Cir. 1985) (Table). Those rules reflect the general principle that "the burden is upon the General Counsel to show the gross amounts of back pay due" and, once the General Counsel does so, then "the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

As the court of appeals concluded (Pet. App. A2), substantial evidence supports the General Counsel's position that the back pay period for the reduced-hour claimants closed on May 29, 1999. Witnesses credited by the ALJ testified that petitioner continued to assign work on a discriminatory basis even after petitioner and the Union executed the labor contract on December 9, 1993. *Id.* at A23, A40. Petitioner's business records

confirmed that "employees junior to the discriminatees continued to work more hours than the discriminatees" after petitioner signed the labor contract. *Id.* at A23; see *id.* at A14-A17. Petitioner did not formally assure employees that it would assign work in accordance with the labor contract until May 29, 1999. *Id.* at A10, A22. The evidence thus amply supports the conclusion that, until that date, petitioner did not manifest a commitment to abide by the Board's order that it cease and desist from assigning work on a discriminatory basis. The General Counsel thus satisfied his burden of establishing that the back pay period closed on May 29, 1999. See *88 Transit Lines, Inc.*, 314 N.L.R.B. 324 (1994) (back pay period closed on date when employer reinstituted a work schedule that it had unlawfully changed), enforced, 55 F.3d 823 (3d Cir. 1995); *H.C. Macaulay Foundry Co.* v. *NLRB*, 553 F.2d 1198, 1202 (9th Cir. 1977) (union terminated its back pay liability as of date on which it requested employer to reinstate the discriminatee).

The court of appeals also correctly concluded that petitioner "did not carry its burden of proving" that the back pay award "should have been reduced." Pet. App. A2. As the ALJ found, petitioner offered nothing in support of its argument in favor of an earlier closing date other than "general denials" that it "never discriminated in its assignment of work to any of its employees." *Id.* at A23. In view of the contrary evidence adduced by the General Counsel, the ALJ reasonably found that those general denials were "unpersuasive." *Ibid.* The court of appeals' fact-bound conclusion that substantial evidence supports the Board's determination that May 29, 1999, was the proper closing date of the back pay period for the reduced-hour claimants raises no issue warranting this

Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. Petitioner contends (Pet. 14-17) that this Court's review is warranted because the ALJ applied an erroneous presumption that NLRA "violations once proved continue to occur." Pet. 15. The court of appeals, however, did not advert to or in any way endorse such a presumption. Instead, the court correctly held that substantial evidence supports the Board's determination of the proper closing date for the back pay period. Pet. App. A2. This case thus does not present an opportunity for this Court to consider the validity of a presumption on which the court of appeals did not rely.[2]

c. There is also no merit to petitioner's contention (Pet. 14-15) that the decision of the court of appeals conflicts with *NLRB* v. *International Union of Operating Engineers, Local 925*, 460 F.2d 589 (5th Cir. 1972). In the portion of *Operating Engineers* on which petitioner relies, the court of appeals enforced the Board's award of additional back pay against a union based on new unfair labor practices that the General Counsel proved in a compliance proceeding rather than in an unfair labor practice proceeding. See *id.* at 599-602. There is no conflict between that holding and the de-

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[2] The ALJ correctly noted that "the General Counsel bears the burden of proving the amount of gross backpay due" (Pet. App. A18) and that "the burden is on the employer * * * to establish facts that reduce the amount due for gross backpay" (*id.* at A19). Although the ALJ also adverted to a "presumption" that petitioner continued to discriminate in the assignment of work "after December of 1993" (*id.* at A23), reliance on that presumption was unnecessary to his decision because the General Counsel made an affirmative showing that petitioner discriminated against employees in the assignment of work after that date. See *ibid.*; pp. 4-5, 6-7, *supra*.

cision here. Both courts enforced the Board's back pay order. Moreover, unlike *Operating Engineers*, this case does not involve the imposition of back pay "based upon conduct and events that were not determined to be unfair labor practices" in the underlying unfair labor practice proceeding. *Id.* at 599. Here, there is no question that the Board ruled in the unfair labor practice proceeding that petitioner's reduction of the work hours of employees who supported the Union violated NLRA Section 8(a)(3). See Pet. App. A9; *In re Cable Car Advertisers, Inc.*, 322 N.L.R.B. at 554, 580. In the subsequent compliance proceeding, the Board did not adjudicate any further violations but simply rejected an established violator's proposed closing date for the back pay period based on evidence that undermined the propriety of that closing date. *Operating Engineers* did not address any such issue.

2. Petitioner also incorrectly contends (Pet. 17-18) that, in awarding Palewicz back pay, the ALJ improperly "change[d]" the Board's finding, in the underlying unfair labor practice proceeding, that Palewicz "could not drive for [petitioner] on Fridays, Saturdays, and Sundays." That fact-bound contention, which (like petitioner's primary contention) involves an attack on the ALJ decision rather than the decision of the court of appeals, lacks merit and does not warrant this Court's review.

The Board did not determine in the underlying unfair labor practice proceeding that Palewicz was never able to drive on Fridays, Saturdays, or Sundays. Rather, the Board found that petitioner's requiring Palewicz to work on those days "conflicted with his work elsewhere." *In re Cable Car Advertisers, Inc.*, 322 N.L.R.B. at 573. Consistent with that earlier finding, the ALJ found in the compliance proceeding that

Palewicz could not "commit * * * in advance" to drive on those days because of his other job. Pet. App. A32. Nonetheless, Palewicz drove "promotional" jobs for petitioner "on days that he also worked his regular job." *Ibid.* For example, "[i]n 1992, Palewicz often worked 5 or 6 days a week for [petitioner] in addition to his full time job" and sometimes worked as much as "40 to 60 hours a week for [petitioner] in addition to his [other] job." *Id.* at A33. The ALJ therefore properly awarded Palewicz back pay on the basis that he worked for petitioner more than two days per week.

3. Finally, petitioner contends that, with respect to Mozol's back pay award, the General Counsel should have brought to the ALJ's attention a March 1999 memorandum, consisting of the Board compliance officer's notes, which indicated that Mozol "voluntarily moved to Wisconsin at the beginning of 1994 and would not have returned to work in San Francisco after mid-1995." Pet. 18. Petitioner argues (*ibid.*) that this information could have led the ALJ to reduce Mozol's back pay award by $10,000. Petitioner is jurisdictionally barred from raising that claim in this Court because petitioner failed to urge such an objection before the Board, and it has alleged no "extraordinary circumstances" excusing its failure to do so. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, petitioner's contention lacks merit. Petitioner concedes that the Board's compliance officer gave a copy of the March 1999 memorandum to "[petitioner's] counsel in the early stages of the backpay proceeding, and that counsel delivered the memo to [petitioner] when that counsel withdrew from repre-

sentation of [petitioner] due to a fee dispute." Pet. 14. The Board cannot be faulted for petitioner's failure to place into evidence a document that petitioner had in its possession. Petitioner bore the burden to establish facts mitigating its back pay liability to Mozol. See *Brown & Root*, 311 F.2d at 454.

Contrary to petitioner's suggestion (Pet. 19), the General Counsel was not required to "share[]" the March 1999 memo with the ALJ under *Lising* v. *INS*, 124 F.3d 996 (9th Cir. 1997). At most, *Lising* indicates that a court of appeals may remand a case for reconsideration when an agency's decision is "directly disproved" by information that the aggrieved party provided to the agency on an official government form. See *Id.* at 998-999. This case involves no such circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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